TABLE OF AUTHORITIES CITED

Cases	Pages
Allen Co. v. Cash Register Co., 322 U.S. 137	12, 14, 15, 16, 19
Basle Theatres, Inc. v. Warner Bros. Pictures Distr. Corp., 24 F.R.D. 476 (W.D. Pa.)	18
Brown Shoe Co. v. United States, 370 U.S. 294	12, 14, 15
California v. Federal Power Commission, 369 U.S. 482	11, 18, 24
Commonwealth Edison Co. v. Allis Chalmers Mfg. Co., 315 F.2d 564, *cer. den.* 375 U.S. 834	21
Continental Co. v. United States, 259 U.S. 156	24
Cutting v. United States Treasury Department, 356 U.S. 926	13
F.P.C. v. Transcontinental Gas Corp., 365 U.S. 1	5
In Re Engelhard, 231 U.S. 646	24
Missouri-Kansas Pipeline Co. v. United States, 108 F.2d 614, *cer. den.* 309 U.S. 687	15
Mitchell v. Singstad, 23 F.R.D. 62 (D. Md.)	23
New York City v. New York Telephone, 261 U.S. 312	24
Panhandle Eastern Pipeline Co. v. P.S.C. of Indiana, 332 U.S. 507	5
People of the State of California v. United States, 180 F.2d 596 (9 Cir.)	22
Phyle v. Duffy, 334 U.S. 431	10
Pierce v. Superior Court, 1 Cal. 2d 759	10
Pipeline Co. v. United States, 312 U.S. 502	15, 16, 19
Sam Fox Publishing Co. v. United States, 366 U.S. 683	15, 16, 17, 19, 20
Santa Rosa v. Fall, 273 U.S. 315	8
Securities Commission v. United States Realty Co., 310 U.S. 434	22
Sutphen Estates v. United States, 342 U.S. 19	16, 17, 19, 22

Pages

United States v. California Cooperative Canneries, 279 U.S. 553 ..... 12, 14, 15
United States v. duPont & Co., 13 F.R.D. 487 (N.D. Ill.) 21
United States v. duPont & Co., 1962 Trade Cases, para. 70,245 (N.D. Ill.) 21
United States v. El Paso Gas Company, 376 U.S. 651 ..... 3, 13
United States v. Radio Corporation of America, 186 F. Supp. 776 (E.D. Pa.), appeal dismissed *sub nom.* Westinghouse Broadcasting Co. v. United States, 364 U.S. 518 15

Wolpe v. Poretsky, 144 F.2d 505 (D.C. Cir.) 18

CONSTITUTIONS, STATUTES AND RULES

California Constitution, Article V, Section 21 10
California Government Code, Section 12520 10
Clayton Act, Section 7 3
Expediting Act, 15 U.S.C. Section 29 ..... 12, 13, 14, 15
15 U.S.C. Section 717(b) 5
28 U.S.C. Section 2101(b) 12
Federal Rules of Civil Procedure:
Rule 24 ..... 17, 20
Rule 24(a) 7, 16
Rule 24(a)(3) 19
Rule 24(b) 8, 23
Revised Rules of the Supreme Court of the United States:
Rule 11 12
Rule 12 2
Rule 13 6
Rule 13(1) 12, 13
Rule 14(2) 13
Rule 16 2
Rule 16(1)(a) 12

TEXTS

Moore's Federal Practice, Vol. 4, para. 24.13 18
Moore's Federal Practice, Vol. 4, para. 24.09 20

Nos. 1090 and 1101

In the Supreme Court of the United States

OCTOBER TERM, 1964

CASCADE NATURAL GAS CORPORATION, *Appellant*, vs. UNITED STATES OF AMERICA, EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION, *Appellees*.	No. 1090
PEOPLE OF THE STATE OF CALIFORNIA, *Appellant*, vs. UNITED STATES OF AMERICA, EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION, *Appellees*.	No. 1101

On Appeal from the United States District Court
For the District of Utah, Central Division

Motions of El Paso Natural Gas Company to Dismiss or Affirm

These are appeals by Cascade Natural Gas Corporation ("Cascade") and Mr. William M. Bennett, styling himself "Special Counsel for the People of the State of California,"

from identical orders entered the same day by the Court below denying appellants' applications to intervene in a Government antitrust case.[1]

At best the appeals are from nonreviewable orders by which the questions presented were rightly decided by the District Court. In reality appellants do not complain of denial of their applications to intervene, but of a divestiture decree not yet entered below. Enforcement of the antitrust laws by the Government against regulated industries in cases of this kind would be reduced to chaos if appellants' claims were to be sustained.

Pursuant to Rule 16 of the Revised Rules of this Court, appellee El Paso Natural Gas Company ("El Paso") moves that each appeal be dismissed on the ground that it is not within the jurisdiction of this Court because not taken in conformity to statute or the Revised Rules of this Court or, alternatively, that each order appealed from be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

PRELIMINARY STATEMENT: WHAT OCCURRED BELOW

On April 6, 1964, this Court held that the merger of Pacific Northwest Pipeline Corporation into El Paso vio-

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1. *United States v. El Paso Natural Gas Company*, et al., Civil No. 143-57 in the United States District Court for the District of Utah, Central Division.

Since the two appeals are from identical orders entered the same day in the same cause, and a single record has been prepared for both pursuant to Rule 12 of the Revised Rules of this Court, we have served and filed a single document containing alternative motions to dismiss or affirm directed to each appeal.

Mr. Bennett's jurisdictional statement is cited "Bennett Br. ....." and the jurisdictional statement of Cascade is cited "Cascade Br. ....."

Italics in quoted matter have been supplied, except where otherwise indicated.

lated Section 7 of the Clayton Act. It reversed the judgment for defendants entered below and directed that El Paso be ordered to divest itself of Pacific Northwest "without delay" (*United States v. El Paso Gas Company*, 376 U.S. 651). Following intensive negotiations between El Paso and the United States during the summer of last year and periodic reports to the District Court, the Court below began divestiture hearings.

Twenty strangers to the litigation then sought to become parties through motions and applications to intervene. These included Cascade and ten other natural gas distributing companies, a corporation seeking to purchase the properties to be divested, the public utilities commissions of seven states, including the California commission (represented by its own chief counsel and not Mr. Bennett) and Mr. Bennett, claiming to represent California as "Special Counsel" for its "People."

The applicants to intervene were not primarily concerned with *antitrust* aspects of divestiture. Instead, they proposed to try out a host of issues directed mainly to the regulatory convenience and necessity of the natural gas consumers they had undertaken to represent. Cascade asserted in its application dated October 5, 1964, that (para. V):

> ". . . rates charged by Cascade Natural Gas Corporation are substantially affected by the rates, practices and exactions of its supplier, so that if the divestiture in this proceeding should result in any material increase in the cost to Cascade Natural Gas Corporation of purchased gas, its competitive position would be severely damaged."

In a memorandum later filed in support of its application Cascade reiterated its complaint that (p. 14):

> ". . . if the costs of the gas reserves allocated to the New Company are so high as to require substantially

increased rates to be imposed upon New Company's customers"

Cascade would be "adversely affected." In like manner, Mr. Bennett's application predicated his interest on the claim that "California is charged with the responsibility of assuring that natural gas is sold at lawful rates." And in the application for stay thereafter lodged by Mr. Bennett with the Clerk of this Court and denied by Mr. Justice Douglas (*infra*, p. 6), Mr. Bennett represented that a stay was required so that he might eventually litigate below such non-antitrust issues as the reasonableness of the "rates and charges to be exacted for [gas] service" and whether or not the New Company to receive the properties to be divested "will be capable of competing to render service in California at reasonable rates."

The applicants' positions were in hopeless conflict. The Utah and Wyoming public service commissions, and seven gas distributing companies, supported El Paso's divestiture proposals and sought to intervene only if the application of another were granted. The California, Idaho and Nevada commissions, and two other distributing companies, confined themselves to claims of right to represent gas consumers in their states upon whatever questions should arise, and they took no position on the divestiture issues which had arisen between El Paso and the United States. The Oregon and Washington commissions, the corporation seeking to intervene as would-be purchaser of the assets to be divested, Cascade, and Mr. Bennett, acting for the "People of the State of California" (as contrasted with the California Public Utilities Commission which took a different position), appeared to oppose El Paso's proposals upon grounds relating to rates and other regulatory matters. Still another gas distributing company concerned itself

primarily with the extent to which the Federal Power Commission would have jurisdiction under the Natural Gas Act to pass upon regulatory aspects of the divestiture plan eventually approved by the District Court.

The Federal Power Commission, which has exclusive jurisdiction to regulate the interstate facilities to be divested,[2] asked to be heard only as *amicus curiae* and its motion for leave to participate in that capacity was promptly granted by the District Court.

On the first day of divestiture hearings the Court below heard extensive argument from counsel for the twenty would-be intervenors[3] and asked each of them to file affidavits and briefs in support of their applications. Certain of the applicants filed memoranda thereafter; others addressed the Court orally.

The applications to intervene were sharply opposed by both the United States and El Paso[4] for the self-evident reason that full participation by the would-be intervenors upon matters unrelated to antitrust aspects of the case would make the "divestiture without delay" ordered by this Court impossible.

On December 8, 1964, the District Court denied all the applications to intervene from the bench (Tr. 353) but with this statement made it clear that any applicant could seek leave to be heard at any time (Tr. 402):

> ". . . I hope there will be nobody who will feel unwelcome here. I do welcome your presence, and I should hope if you had something you thought would be a con-

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2. 15 U.S.C. § 717(b); see *Panhandle Eastern Pipeline Co. v. P.S.C. of Indiana*, 332 U.S. 507, and *F.P.C. v. Transcontinental Gas Corp.*, 365 U.S. 1.

3. Transcript of proceedings held October 19, 1964, pp. 75, *et seq.*

4. *Id.* at pp. 79, 109.

tribution and of some assistance to the Court that you would have no hesitation in approaching us about that, either here in the Courtroom or orally or by written memorandum.

"I said somewhere along the line last week that there is quite an aggregation of talent here; and if there is any help that you can give the Court, the Court will welcome that."

Formal written orders denying the applications to intervene were entered January 22, 1965. Fifty-two days later, on March 15, 1965, Mr. Bennett filed a notice of appeal; Cascade had appealed from denial of its application February 19, 1965.[5] On February 19, 1965, Mr. Bennett lodged with the Clerk of this Court an application for stay of the proceedings below pending disposition of his appeal. The United States and El Paso both lodged papers in reply opposing a stay. El Paso also filed objections to Mr. Bennett's authority to represent California. Mr. Justice Douglas denied the stay application on March 2, 1965.

Of the twenty applicants for leave to intervene, only Mr. Bennett and Cascade have appealed; the other eighteen, including California's own public utilities commission, were content to let the orders denying their applications stand.[6] The divestiture proceedings below have not terminated and no decree has been entered. The hearings thus far have consumed approximately 12 full trial days, the reporter's transcript is in excess of 1000 pages, numerous conferences

5. Earlier, on January 8, 1965, Mr. Bennett had taken an appeal from the verbal order denying his application made December 8, 1964. This appeal has since been abandoned through failure to docket within the time required by Rule 13 of the Revised Rules of this Court.

6. The Oregon Public Utility Commission appealed from the order denying its application to intervene, but abandoned its appeal by a telegram to the Clerk dated February 16, 1965.

have been held in chambers between the parties and the Court, and the Court has received in evidence some twenty-three complicated and massive exhibits offered by the Government and eighteen offered by El Paso.

QUESTIONS PRESENTED

The questions presented by these appeals are so insubstantial as to submit comfortably to summary disposition. Resolution of any question against either appellant will dispose of its appeal. The questions are:

1. With respect to Mr. Bennett alone,

   (a) whether he has authority to prosecute his appeal as "Special Counsel for the People of the State of California," and

   (b) whether his notice of appeal was filed in the District Court too late.

2. With respect to Cascade alone, whether its appeal was docketed too late.

3. With respect to both appeals,

   (a) whether the orders appealed from are reviewable, and

   (b) if this Court has jurisdiction to entertain the appeals, whether either appellant was entitled to intervene as of right pursuant to Rule 24(a) of the Federal Rules of Civil Procedure.

Both appellants agree with us that the Court *may* reach the question whether they were entitled to intervene as of right (Bennett Br. 6-7; Cascade Br. 3-4), but only if that question is pertinent to reviewability of the orders appealed from (*infra*, p. 16) or, if appellate jurisdiction is found, upon El Paso's motion for summary affirmance. In appellants' jurisdictional statements there is no discussion of the

authorities holding orders of this kind nonreviewable nor is there any reference to the untimeliness of each appeal in the different respects just mentioned.

Cascade confines its view of the questions presented to the ultimate issue whether Cascade was entitled to intervene as of right. Mr. Bennett (Bennett Br. 6-7) apprehends two further questions which do not exist. The first, embraced in questions numbered 1 and 2 in Mr. Bennett's jurisdictional statement (Bennett Br. 6), appeals to this Court to supervise or police incomplete and pending divestiture proceedings below in which no decree has been entered. For this there is no authority (*infra*, p. 24). The second calls upon the Court to determine whether Mr. Bennett was entitled to permissive intervention under Rule 24(b). The reasons no such question is before the Court are treated *infra*, p. 23n. 16.

ARGUMENT

Matters Peculiar to Each Appeal.

1. Mr. Bennett Has No Authority or Other Right to Represent California Here.

This Court has undoubted power at any stage of the case to require any attorney to substantiate his authority to appear (*Santa Rosa v. Fall*, 273 U.S. 315) and where a substantial question of authority is raised, that should be the first order of business.

Struck by the remarkable circumstance that two attorneys appeared to represent California in the Court below, the District Judge asked the obvious question (Tr. 24):

> "THE COURT: You represent whom?
>
> MR. BENNETT: The State of California, your Honor.
>
> THE COURT: Are you from the Attorney General's Office?
>
> MR. BENNETT: I am representing the Governor of the State of California and the Attorney General of

the State of California, and the State of California in its sovereign capacity, as I have throughout these entire proceedings."

We represent the following to the Court, which to say the least raises serious questions regarding the correctness of these statements.

On February 18, 1965, apparently in response to a telegram sent to him by counsel for El Paso, Edmund G. Brown, Governor of California, sent the following telegram to Mr. Bennett:

"William M. Bennett, Commissioner,
Public Utilities Commission,
350 McAllister Street,
San Francisco, California.

This is to confirm my understanding that you are not acting by any authority from me in appearing further for the State of California in United States of America v. El Paso Natural Gas Company and Pacific Northwest Pipeline Corporation in the United States District Court in Utah *or in any appeal arising out of that action.* I have already indicated that I will rely upon the collective judgment of the Public Utilities Commission in determining where the best interests of California lie. I suggest that you make known to the Commission any information you have bearing on these problems.

Edmund G. Brown
Governor"

Mr. Bennett is one of five members of the California public utilities commission. He does not represent the full commission in any capacity, he is not counsel for the commission, and the truth of this was confirmed in a telegram to counsel for El Paso sent by the commission's Acting

President on the same day as the Governor's telegram to Mr. Bennett, in the following form:

> "It is suggested you raise any questions concerning the divestiture proceedings in the appropriate Court. The California Public Utilities Commission has authorized its chief counsel, Richard E. Tuttle, to appear on its behalf in the divestiture proceedings. Mr. Bennett does not represent the California Public Utilities Commission in this matter.
>
> Peter E. Mitchell
> Acting President
> California Public
> Utilities Commission"

The California commission, as we have said, elected to let the order denying its application to intervene stand and did not appeal.

Thomas C. Lynch is the duly elected and acting Attorney General of California. We have been advised informally by Mr. Lynch that he has given Mr. Bennett no authority to represent the Attorney General in this matter. Moreover, the Attorney General and his duly appointed deputies and assistants in the office of the State Attorney General are the only persons authorized under California law to represent the interests of California in legal proceedings (California Const., Art. V, § 21; and see *Phyle v. Duffy*, 334 U.S. 431, 441, and *Pierce v. Superior Court*, 1 Cal. 2d 759, 761-762). There is no provision under California law for the office of "Special Counsel for the People of the State of California." To the contrary, Section 12520 of the California Government Code provides that the Attorney General "shall not employ special counsel in any case" except with respect to matters involving escheated property and county district attorneys not material here.

Inasmuch as Mr. Bennett has appeared for California in matters related to this antitrust action in the past,[7] we note briefly the changed circumstances which have intervened. In the proceedings held by the Federal Power Commission upon applications for Commission authority to merge Pacific Northwest into El Paso, Mr. Bennett was employed as a Deputy California Attorney General and properly represented California before the Commission as such. After the Commission approved the merger, and before its order was reversed in *California v. Federal Power Commission*, Mr. Bennett left the employ of the California Attorney General and was appointed counsel for the California public utilities commission. The California Attorney General then declined to participate further in the matter and purported to authorize the California commission to act for the State in the litigation. On or about April 14, 1960, then California Attorney General Stanley Mosk, now an Associate Justice of the California Supreme Court, issued an explanatory statement set forth in full in the margin.[8] Following his appearance

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7. *Eg., California v. Federal Power Commission*, 369 U.S. 482.

8. "Attorney General Stanley Mosk today announced that at its request, the Public Utilities Commission has taken over handling of the appeal of the merger case involving El Paso Natural Gas Company.

"Although the Attorney General's office, through Deputy Attorney General William Bennett, had handled the proceedings in opposition to the El Paso proposed merger before the Federal Power Commission, with Bennett's appointment as General Counsel of the Public Utilities Commission, Mosk stated the Public Utilities Commission itself had determined to appeal from the Federal Power Commission's adverse ruling.

"Arrangements for the handling of the case on appeal were made with the office of Attorney General Mosk by Public Utilities Commissioner Everett McKeage. The Public Utilities Commission counsel, William Bennett, will continue to handle the litigation.

"The appeal from the Federal Power Commission ruling which allowed El Paso to merge with Pacific Northwest Gas Company will allege that higher rates to California consumers will result. The FPC rejected this contention in its ruling."

in this Court as counsel for the California Commission, Mr. Bennett became one of its five members; he occupied that capacity when he applied to intervene in the divestiture proceedings below and occupies that capacity now.

We believe this Court should require Mr. Bennett to substantiate his authority to appear on behalf of California before he is permitted to proceed further.

2. Mr. Bennett's Notice of Appeal Was Filed Too Late.

As just mentioned, Mr. Bennett's notice of appeal was filed in the District Court 52 days after entry of the written order from which the appeal was taken. Under Rule 11 of the Revised Rules of this Court the time for appeal is governed by 28 U.S.C. § 2101(b), which requires that the notice be filed within 30 days from the order appealed from if it is interlocutory and within 60 days if it is final.[9] This Court has consistently treated orders denying applications to intervene entered before judgment in the cause as interlocutory (*United States v. California Cooperative Canneries*, 279 U.S. 553; *Allen Co. v. Cash Register Co.*, 322 U.S. 137; and see *Brown Shoe Co. v. United States*, 370 U.S. 294, 305).

We submit Mr. Bennett's appeal should therefore be dismissed pursuant to Rule 16(1)(a) as untimely.

3. Cascade's Appeal Was Docketed Too Late.

Rule 13(1) of the Revised Rules of this Court required Cascade to docket its appeal not more than 60 days after

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9. This is in harmony with the command of the Expediting Act (15 U.S.C. § 29) that an appeal in Government antitrust cases of this kind be taken directly to this Court from "the final judgment of the District Court" within 60 days. Since the Expediting Act applies here, the order of which Mr. Bennett complains is not reviewable at all because it is interlocutory, whether or not the notice of appeal was timely filed. We discuss this *infra*, p. 13.

filing of its notice of appeal, unless the time is enlarged by the Court below.

The time for docketing was not enlarged.

Just as its time for docketing was about to expire, counsel for Cascade petitioned the District Court for an order enlarging its time to docket until after a final divestiture decree had been entered. This was predicated upon an assertion that the District Court Clerk could not prepare and forward the record within the time for docketing in any event, and upon the remarkable claim that Cascade could not determine whether it would wish to prosecute its appeal from the order denying its application to intervene until it had ascertained whether the final divestiture decree would be satisfactory or unsatisfactory to Cascade. A few days later, in a letter to the District Court, Cascade acknowledged it had just been advised that the District Court Clerk had already forwarded the record to this Court. Cascade nevertheless persisted in its claim that its time for docketing should be extended until it could be afforded an opportunity to examine the divestiture decree to be entered.

The District Court denied Cascade's petition.

The Clerk has informed us Cascade's appeal was docketed April 21, 1965, 61 days after filing of its notice of appeal on February 19, 1965. The appeal should be dismissed pursuant to Rule 14(2) for failure to docket within the time required by Rule 13(1).[10]

The Orders Appealed From Are Not Reviewable.

Review in this case is governed by the Expediting Act (15 U.S.C. § 29, so held in *United States v. El Paso Gas Co.*, 376 U.S. 651, 652). Appeal lies only "from the final

10. See *Cutting v. United States Treasury Department*, 356 U.S. 926.

judgment of the District Court" and then only to this Court (*United States v. California Cooperative Canneries*, 279 U.S. 553). The statutory purpose and its consequence were recently reiterated in *Brown Shoe Co. v. United States*, 370 U.S. 294, 305 n. 9:

> "Congress thus limited the right of review in such cases [subject to the Expediting Act] *to an appeal from a decree which disposed of all matters, and it precluded the possibility of an appeal either to this Court or to a court of appeals from an interlocutory decree.*"

The statutory command that this Court review only "the final judgment" which disposes "of all matters" obviously contemplates a decree deciding all the antitrust issues joined between the United States and the defendants, not an interlocutory order denying an application to intervene. Any other interpretation would promote the pernicious consequence which Congress has prohibited and these appellants intend. For as the Court held in *Allen Co. v. Cash Register Co.*, 322 U.S. 137, 141-142:

> "It is common knowledge that, where a suit is of large public interest, the members of the public often desire to present their views to the Court in support of the claim or the defense. *To permit a multitude of such interventions may result in accumulating proofs and arguments without assisting the Court. . . .*
>
> *"The challenged order is but an order in the cause and not the final judgment . . . .* It was, *inter alia*, to prevent the delay of unwarranted appeals by disappointed applicants to intervene, which would suspend the ultimate disposition of suits under the antitrust acts, that jurisdiction to review District Court decrees was not vested in the Circuit Courts of Appeals but solely in this Court, and that the statute limited the right of appeal to final decrees."

With these words this Court dismissed Allen Co.'s appeal from an order denying it leave to intervene in proceedings upon a petition by National Cash Register Co. for the Court's permission to acquire Allen Co., its competitor, which was required by a consent decree entered earlier in a Government antitrust case. This is square authority for dismissal of these appeals.[11]

The cases relied on by appellants are not to the contrary. Mr. Bennett cites *Allen Co.* and *California Canneries* (Bennett Br. 6) which, as just shown, hold against reviewability, and *Missouri-Kansas Pipeline Co. v. United States*, 108 F.2d 614, *cer. den.* 309 U.S. 687, and *Sam Fox Publishing Co. v. United States*, 366 U.S. 683.

Citation of the *Pipeline Co.* decision in the Third Circuit as authority for appealability is difficult to fathom. A consent decree had been entered in a Government action to enjoin activities by defendant public utilities which allegedly eliminated Panhandle Eastern Pipeline Co. as a competitor for the Detroit market. The decree expressly permitted Pipeline Co. to become a party to enforce rights granted it by the decree. Pipeline's Co.'s petition for leave to intervene was denied and it appealed to the Court of Appeals for the Third Circuit. The Court of Appeals held, in the very opinion relied on by Mr. Bennett, that it was powerless to consider any of the questions raised because of the decision in *United States v. California Cooperative Canneries, supra,* that only this Court has appellate jurisdiction in Expediting Act cases. This Court decided the questions two years later in *Pipeline Co. v. United States*, 312 U.S. 502. It held Pipeline Co. was entitled to become

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11. See also *United States v. California Cooperative Canneries, supra,* on which both the *Allen* decision and the holding in *Brown Shoe Co.* just mentioned relied, and *United States v. Radio Corporation of America*, 186 F.Supp. 776 (E.D. Pa.), appeal dismissed *sub nom. Westinghouse Broadcasting Co. v. United States*, 364 U.S. 518.

a party to the proceedings below pursuant to the express provisions of the earlier consent decree giving it that right, and that the principles applicable to review of orders denying intervention in the absence of such a decree created right were irrelevant. If this were not obvious from the *Pipeline Co.* opinion itself, it became so in the *Allen Co.* case, where *Pipeline Co.* was distinguished because (322 U.S. at 141):

> ". . . there the applicant on whose behalf intervention was asked was named in the original decree as one who should be heard in respect of its property rights in the event certain action was taken."

Mr Bennett's reliance upon *Sam Fox Publishing Co. v. United States, supra,* is equally misplaced, for this Court also dismissed that appeal upon the ground that a petitioner seeking to intervene after entry of a final judgment giving relief was required to show it was entitled to do so as of right, a subject to which we turn shortly.

Cascade cites as authority for reviewability (Cascade Br. 3) this Court's opinion in *Pipeline Co. v. United States, supra,* already discussed, and *Sutphen Estates v. United States,* 342 U.S. 19. The latter, like *Sam Fox Publishing Co.,* suggests that a party seeking to intervene after entry of a relief judgment may be entitled to do so if it can be demonstrated that the claim is based on *right* rather than discretion, but the claim failed and the appeal was dismissed.

We turn to the authorities holding that neither appellant was entitled to intervene under F.R.C.P. Rule 24(a) as of right, after first noting a distinction on the question of reviewability between this case and the kind of case represented by *Sutphen Estates* and *Sam Fox Publishing Co.* In both of those decisions a decree providing antitrust relief

had been entered and was effective before intervention questions arose. An appeal from the orders denying intervention in those cases could therefore do no harm, since the Government had obtained its relief. This case is sharply different. In the proceedings below no decree has been entered and no relief obtained. If these appeals are entertained the "divestiture without delay" ordered by this Court last term will be defeated to the extent of the time required to brief and argue the appeals on the merits. It is also true that if this Court should depart from the unbroken line of authority next to be discussed and hold these appellants entitled to intervene, the lengthy proceedings had below would have to be undertaken all over again, and this would demolish any possibility for "divestiture without delay".

Neither Appellant Was Entitled to Intervene.

If the distinction just noted between this case, *Sam Fox Publishing Co.* and *Sutphen Estates* does not lay those decisions aside, then the question whether appellants were entitled to intervene as of right is dispositive of both the jurisdiction and the merits. Lacking such a right, the appeals would be dismissed, and the same authorities supporting that submission would also warrant summary affirmance if jurisdiction in some way is found. Rule 24 of the Rules of Civil Procedure controls. It permits intervention as of right only if a "timely application" shows that:

1. a statute of the United States confers an unconditional right to intervene,

2. the representation of the applicant's interest by the parties is or may be inadequate *and* the applicant is or may be bound by the judgment, or

3. the applicant will be adversely affected by disposition of property subject to the control of the Court.

Neither application was timely. Each came long after the main trial, after entry of the judgment on the antitrust merits and after every issue between the United States and El Paso had been finally adjudicated except for the task of fashioning a divestiture decree in compliance with the mandate of this Court. The orders appealed from were right upon this ground alone (*Basle Theatres, Inc. v. Warner Bros. Pictures Distr. Corp.* 24 F.R.D. 476 (W.D. Pa.); 4 Moore's Federal Practice, para. 24.13).[12]

No statute confers a right to intervene upon either appellant and neither makes any contrary claim.

An unbroken line of decisions in this Court holds that neither appellant has any interest in the proceedings upon which the claim of a right to intervene can be laid. As we have seen, appellants wish to intrude themselves into the proceedings below to litigate rate and other regulatory questions. We submit this Court held in *California v. Federal Power Commission*, 369 U.S. 482, that such matters give way here to paramount antitrust considerations.

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12. Cascade makes no contrary contention. Mr. Bennett cites in opposition *Wolpe v. Poretsky*, 144 F.2d 505 (D.C. Cir.) and authorities of like effect holding, as Mr. Bennett concedes (Bennett Br. 12), that intervention after judgment on the merits is permissible only when it will not prejudice the main action and the interests of the parties, or where intervention is essential to accord an interested applicant an appeal to which he is entitled.

Intervention by these appellants would undo what has been accomplished in the protracted divestiture proceedings below between the parties; no clearer case of prejudice can be imagined. Moreover, these appellants have no right to an appeal which needs protection because the public interest, including theirs and the consumers' interests they have volunteered to represent, are the proper business of the United States.

Four decisions already mentioned in connection with appealability, *Pipeline Co. v. United States, Allen Co. v. Cash Register Co., Sutphen Estates v. United States, and Sam Fox Publishing Co. v. United States,* also are dispositive of the merits. In *Pipeline Co.* this Court held that the victim of the antitrust violation there alleged was entitled to become a party only because the decree expressly gave it that right, not upon principles applicable to intervention. *Allen Co.* held the petitioner not entitled to intervene in Government antitrust proceedings for the purpose of protesting the defendant's request for permission to acquire the petitioner.

In *Sutphen Estates* the Court below ordered defendant Warner Brothers reorganized into two companies. Warner had guaranteed a lease given by Sutphen Estates to a Warner affiliate. The lessor sought to intervene to protect its "rights" against Warner as guarantor. This Court rejected the claim. It recognized that the case involved "a distribution or other disposition of property which is in the custody or subject to the control or disposition of the Court" within Rule 24(a)(3), but pointed out (342 U.S. at 22):

> "... it is the authority of the Court under the Sherman Act that sanctions and directs the reorganization."

The appeal was dismissed and the holding disposes, we submit, of Cascade's claim to a right to intervene upon the ground that it has a contract with El Paso to purchase gas.[13]

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13. In its jurisdictional statement Cascade repeats an astonishing claim made at various times below. It filed affidavits containing allegedly expert opinion to the effect that the New Company to be organized in the course of divestiture would be allocated reserves of natural gas insufficient to serve Cascade's needs. Cascade says (Cascade Br. 5) that because these affidavits were "uncontroverted by either the plaintiff or the defendant" the opinions containing them "must be deemed admitted" for present purposes.

The most cursory examination of the reporter's transcript will show that the United States and El Paso devoted numerous trial

Any claim by Cascade of a property right as a basis for intervention also is disposed of by this decision and by the many authorities collected by Professor Moore in answer to this question (4 Moore's Federal Practice, para. 24.09, p. 45):

> "What kind of an interest must a petitioner have in property subject to the control of a court before he can claim an absolute right to intervene? *Obviously it must be an interest known and protected by the law:* A claim of ownership, or a lesser interest sufficient and of the type to be denominated a lien equitable or legal."

Cascade has no such interest and claims none.

While Mr. Bennett's reliance upon *Sam Fox Publishing Co. v. United States* as authority for reviewability is misplaced (Bennett Br. 6, *supra* p. 16), the decision also holds squarely against him on the merits. The United States sued ASCAP to restrain practices allegedly injurious to competition for the artistic works of ASCAP members. After entry of a consent decree, certain publisher members of ASCAP sought to intervene in modification proceedings. The Court held they had no interest within Rule 24 (p. 689):

> "We regard it as fully settled that a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation, and hence may not, as of right, intervene in it."

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days to resolution of these very matters. It strains the imagination to suppose that the parties were obliged to interrupt their conduct of the hearings to prepare and file affidavits controverting opinions expressed by strangers to the litigation. It is plain that the testimony offered by both parties "controverts" for this purpose and, in any event, that the public interest on this and every other question was adequately represented by the United States.

The Court buttressed this conclusion with a warning that intervention ought not "to subvert":

> "... the unquestionably sound policy of not permitting private antitrust plaintiffs to press their claims against alleged violators in the same suit as the government ..." (p. 693).[14]

We call attention in addition to the decision of the Seventh Circuit in *Commonwealth Edison Co. v. Allis Chalmers Mfg. Co.*, 315 F.2d 564 *cer. den.* 375 U.S. 834, which appears squarely in point and in harmony with the decisions of this Court. This was an antitrust damage suit brought by Illinois public utilities companies against manufacturers of utility electrical equipment. Plaintiffs alleged that the defendants conspired to fix prices, allocate markets and the like, so that plaintiffs were overcharged for electrical equipment they purchased from defendants. The Attorney General of Illinois sought to intervene "in order to represent and protect the interests of the public consumers ... who ... were injured by defendants' price-fixing conspiracies." Intervention was denied (p. 566-567):

> "We hold that the State of Illinois as agent or *parens patriae* of the consumers (accepting arguendo that the State of Illinois can properly assume such role) or even the consumers themselves do not have any direct personal or pecuniary interest in these antitrust actions. Our holding renders moot any discussion of the existence of the subsumed secondary elements. The rationale for our holding follows.
>
> "The interests of plaintiffs and the consumers are different and arise from separate though related opera-

14. See also the opinions in *United States v. duPont & Co.*, reported at 13 F.R.D. 487 (N.D. Ill.) and 1962 Trade Cases, para. 70,245 (N.D. Ill.), both denying stockholders' petitions to intervene brought at various stages of the case.

tive facts. The legal interest of plaintiffs which they are attempting to vindicate in these actions arises under the federal antitrust statutes. The damages, if any, to which they are entitled are measured by the hurt they may have suffered by reason of the alleged conspiracies claimed to be violative of the antitrust laws. That hurt is measured by the excessive prices they claim were paid for equipment purchased from defendants. The alleged conspiracies spent themselves on these purchasers. The after effects of the hurt on the consumers are consequential and too remote for the consumers to gain rights against the conspirators.

"The consumers' rights, if any, to reparation for their consequential hurt arise from higher rates and charges for services provided by plaintiffs. That is the proximate cause of their injury, not the antitrust violation. See *Keogh v. C. & N. Ry. Co.*, 260 U.S. 156, 43 S. Ct. 47, 67 L.Ed. 183 (1922). *The consumers' rights do not penetrate through to the antitrust conspiracies.*"

Neither appellant has cited a single decision of this or any other Court allowing intervention in a Government antitrust case, much less in divestiture proceedings of the kind pending below. No such decision is cited because none exists. On the merits Cascade discusses only *Sutphen Estates* (Cascade Br. 7) in which a like appeal was dismissed. Mr. Bennett relies (Bennet Br. 16-18) upon *People of the State of California v. United States*, 180 F.2d 596 (9 Cir.), *Mitchell v. Singstad*, 23 F.R.D. 62 (D. Md.), and *Securities Commission v. United States Realty Co.*, 310 U.S. 434. *California v. United States* held the state entitled to intervene in a government action to quiet title to water in which California claimed absolute ownership and as *parens patriate* because there was no other agency to protect the interest of her citizens. Nothing of that kind is involved here. The *Securities Commission* case decides only

that the S.E.C. was entitled to intervene in bankruptcy proceedings upon grounds peculiar to bankruptcy[15] for the purpose of raising the same kind of issues as might have been joined by the parties. We do not pause to discuss *Mitchell v. Singstad,* which deals with the right of a state road commission to intervene in a labor dispute.

This disposes of the matter upon well-settled authority.[16] It appears appropriate, however, to point up three obvious truths respecting these appeals and their lack of any merit.

First, *neither appellant is in reality appealing from the order denying its application to intervene.* Each intends to use its appeal as a device to obtain review of a divestiture decree not yet entered below. Cascade explicitly conceded this in its communications to the District Court upon its petition for an order enlarging the time to docket (*supra,* p. 13). Mr. Bennett's jurisdictional statement concerns itself primarily with his dissatisfaction with different divestiture plans he fears the District Court *might* approve (Bennett Br. 8, 10). For his claim that this Court should now concern itself with pending and incomplete divestiture proceedings in which no decree has yet been entered Mr. Bennett relies

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15. The Commission sought to intervene in Chapter XI proceedings and the holding that it was entitled to do so proceeded in large part from its statutory right to intervene in proceedings under Chapter X.

16. While Cascade confines itself to a claim that it was entitled to intervene as of right (Cascade Br. 3) Mr. Bennett asserts (Bennett Br. 7) he is entitled to a determination by this Court whether the District Court erred in failing to allow him permissive intervention with F.R.C.P. Rule 24(b). We do not pause upon this question, for it is clear that the order of which Mr. Bennett complains is not reviewable unless he had a *right* to intervene. In any event, the requirements of Rule 24(b) for permissive intervention could not be met. No statute confers a conditional right to intervene. Mr. Bennett asserts no claim or defense in common with a question of fact or law in the action between the parties and the requirement of the rule that the Court below "consider whether the intervention will unduly delay or prejudice the adjudication" plainly precluded permissive intervention.

on *Continental Co. v. United States*, 259 U.S. 156. The inaptness of the authority cited is demonstrated by the very portion of the opinion Mr. Bennett quotes (Bennett Br. 19, quoting 259 U.S. at 165):

> "We delegated to the District Court the duty of formulating a decree in compliance with the principles announced in our judgment of reversal, and that gives us plenary power where the compliance has been attempted *and the decree in any proper way is brought to our attention* to see that it follows our opinion.

Here there is no decree to review and neither appellant has properly placed any question before the Court.

Second, if appellants are correct in their claim of a right to intervene here, the Government enforcement of the antitrust laws against regulated industries sanctioned by this Court in *California v. Federal Power Commission, supra*, will become impossible. It is clear that if Cascade and Mr. Bennett can intervene in cases of this kind, then so can *all state regulatory commissions* representing consumers of a defendant's gas or other product[17] and *all distributing companies* selling those products.

Third, in the specifics of this case, validation of these claims would undo all that has been accomplished below. Divestiture proceedings which have taken 12 trial days, over 1000 pages of reporter's transcript, and in which 41 exhibits have been received in evidence, would have to begin again in order that these appellants, and all others similarly situated, might be given an opportunity to litigate to their satisfaction the peripheral matters on which they wish to be heard.

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17. See *New York City v. New York Telephone*, 261 U.S. 312, and *In Re Engelhard*, 231 U.S. 646, in which telephone subscribers' petitions to intervene were denied in actions relating to rates in which state commissions were parties.

CONCLUSION

We do not believe the consequences just mentioned have any sanction in the applicable law or that the claims of appellants from which those consequences would flow warrant further consideration by this Court.

The appeals should be dismissed, but if they are in some way found to be properly before the Court, then summary affirmance of the orders appealed from would be appropriate.

Respectfully submitted,

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